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Supreme Court, U.S.

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**In the
Supreme Court of the United States**

U.S. ROBERT SEEVER, CLERK

OCTOBER TERM, 1971

No. 71-738

THE MESCALERO APACHE TRIBE,

Petitioner,

VS.

**FRANKLIN JONES, COMMISSIONER
OF THE BUREAU OF REVENUE OF
THE STATE OF NEW MEXICO, and
THE BUREAU OF REVENUE OF THE
STATE OF NEW MEXICO,**

Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF THE STATE OF NEW MEXICO**

FETTINGER & BURROUGHS

**By F. Randolph Burroughs
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Counsel for Petitioner

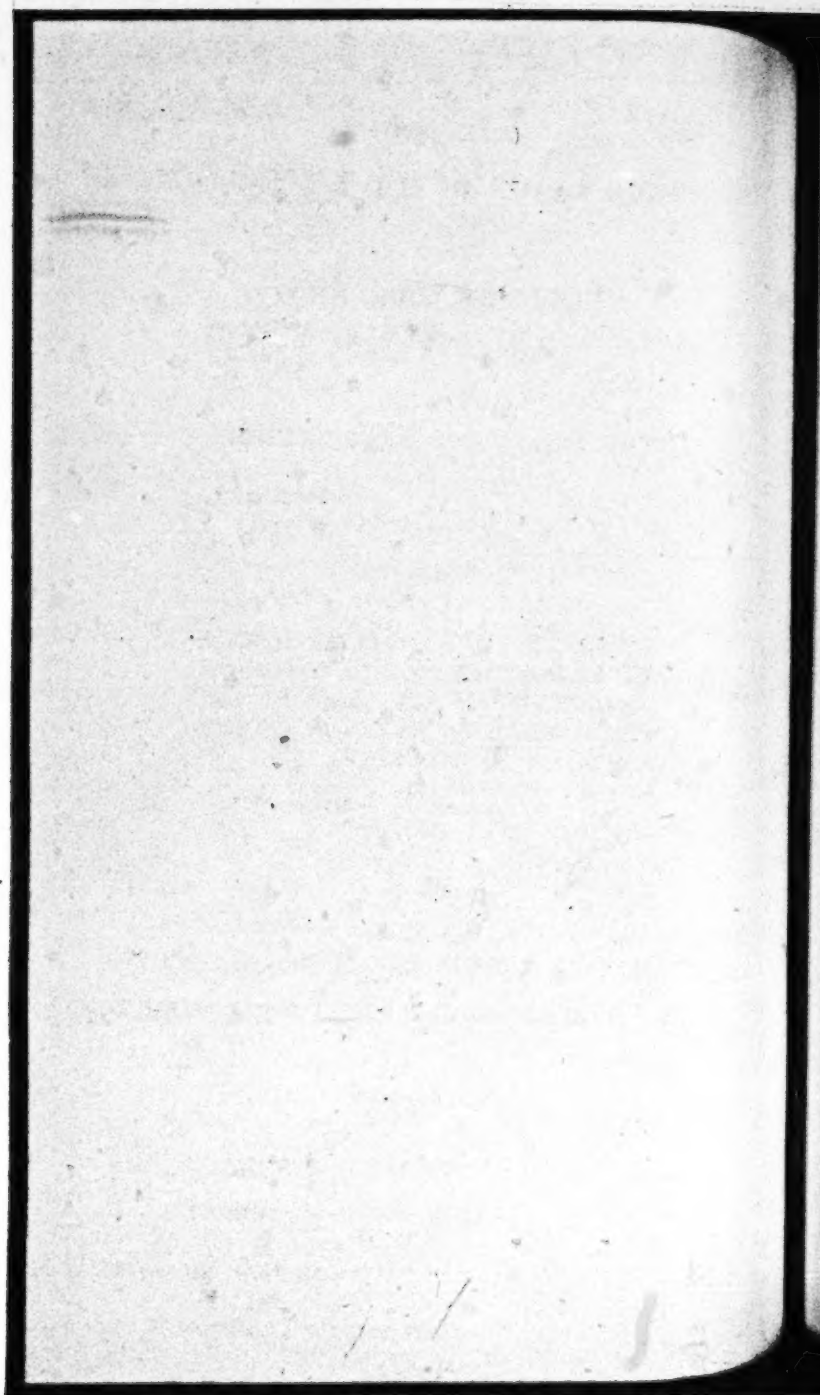


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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. _____

THE MESCALERO APACHE TRIBE,

Petitioner,

vs.

**FRANKLIN JONES, COMMISSIONER
OF THE BUREAU OF REVENUE OF
THE STATE OF NEW MEXICO, and
THE BUREAU OF REVENUE OF THE
STATE OF NEW MEXICO,**

Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF THE STATE OF NEW MEXICO**

The Mescalero Apache Tribe petitions for a Writ of Certiorari to review the judgment of the Court of Appeals of the State of New Mexico, entered in this case on August 4, 1971.

Opinion Below

The Opinion of the Court of Appeals of the State of New Mexico has not as yet been reported, but will appear in 82 N.M. _____, _____ P. 2d _____ (Ct. App. 1971). A copy of said Opinion is marked Appendix A and attached to this Petition.

Jurisdiction

The Mescalero Apache Tribe is engaged in a business enterprise, a ski resort, which by necessity is located primarily on United States lands adjacent to the Mescalero Apache Reservation. The State of New Mexico sought to tax: (1) The personal property owned by the Tribe and used in this business, which is wholly owned and operated by the Mescalero Apache Tribe; (2) the gross receipts of the Tribal enterprise, a privilege tax, on the privilege of doing business in New Mexico. The compensation tax was imposed pursuant to Section 72-17-3, N.M.S.A., 1963 Comp., and the gross receipts tax was assessed under

the Emergency School Tax Act as amended, being Sections 72-16-1 through 72-16-47, N.M.S.A., 1953 Comp.

A timely Claim for Refund and Protest of Assessment was filed with the Commissioner of the Bureau of Revenue of the State of New Mexico in Santa Fe, New Mexico by the Mescalero Apache Tribe. The Protest and Claim for Refund were denied by the Commissioner of the Bureau of Revenue on the 23rd day of December, 1970, holding that the Tribal interests were taxable. The matter was appealed to the Court of Appeals of the State of New Mexico pursuant to Sections 18-7-8 (F) and 72-13-39 N.M.S.A., 1953 Comp. On August 6, 1971, the Court of Appeals of the State of New Mexico affirmed the decision of the Commissioner of the Bureau of Revenue, by a Court divided on rationale. A timely Motion for Re-hearing was filed and an Order Denying the Motion for Re-hearing was entered September 7, 1971. A timely Petition for Writ of Certiorari was filed with the Supreme Court of the State of New Mexico on September 28, 1971 and an Order Denying the Petition for Writ of Certiorari was entered on October 6, 1971. This was the final order entered in this cause by the New Mexico appellate courts. This Court has jurisdiction of this Petition for Writ of Certiorari under 28 U.S.C. Section 1257 (3).

Questions Presented

1. Can the State of New Mexico, acting under state law, validly impose a personal property tax upon personal property owned by an Indian tribe and utilized in a Tribal operated enterprise, where said Tribe has a treaty with the federal government, is governmentally structured pursuant to the Indian Reorganization Act, and has established the enterprise pursuant to federal statutes for Indian economic development?
2. Can the State of New Mexico, acting under state law, validly impose its gross receipts tax, a privilege tax, upon an Indian tribe operated enterprise, where said Tribe has a treaty with the federal government, is governmentally structured pursuant to the Indian Reorganization Act, and has established the enter-

price pursuant to federal statutes for Indian economic development?

Constitutional Provisions, Statutes, Orders and Regulations Involved

The relevant Constitutional provisions, statutes, orders and regulations are as follows:

1. The U.S. Const. Art. I, Sec. 8, Cl. 3:

"To regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes;"

2. The Treaty of July 1, 1852, 19 Stat. 979, between the United States of America and the Mescalero Apache Tribe. The Treaty is attached as Appendix B to this Petition.

3. 35 U.S.C. 465:

"The Secretary of the Interior is hereby authorized, in his discretion, to acquire, through purchase relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

For the acquisition of such lands, interests in lands, water rights and surface rights, and for expenses incident to such acquisition, there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed \$2,000,000 in any one fiscal year: Provided, That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona, nor in New Mexico, in the event that legislation to define the exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legislation, becomes law.

The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.

Title to any lands or rights acquired pursuant to sections 461, 462, 463, 464, 466-470, 471-473, 474, 475, 476-478, and 479 of this title shall be taken in the

name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

4. 25 U.S.C. 470:

"There is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, the sum of \$20,000,000 to be established as a revolving fund from which the Secretary of the Interior, under such rules and regulations as he may prescribe, may make loans to Indian chartered corporations for the purpose of promoting the economic development of such tribes and of their members, and may defray the expenses of administering such loans. Repayment of amounts loaned under this authorization shall be credited to the revolving fund and shall be available for the purposes for which the fund is established.

5. The Enabling Act For New Mexico, June 20, 1910, 36 Statutes at Large, 557, Ch. 310, Sec. 2, CL 2:

"That the people inhabiting said proposed state do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the congress of the United States; that the lands and other property belonging to citizens of the United States residing without the said state shall never be taxed at a higher rate than the lands and other property belonging to residents thereof; that no taxes shall be imposed by the state upon lands or property therein belonging to or which may hereafter be acquired by the United States or reserved for its use; but nothing herein or in the ordinance herein

provided for, shall preclude the said state from taxing, as other lands and other property are taxed, any lands and other property outside of an Indian Reservation owned or held by any Indian, save and except such lands as have been granted or acquired as aforesaid or as may be granted or acquired as aforesaid or may be granted or confirmed to any Indian or Indians under any act of congress, but said ordinance shall provide that all such lands shall be exempt from taxation by said state so long and to such extent as congress has prescribed or may hereafter prescribe.

8. The other statutes and regulations are too long for reproduction in this portion of the brief and are attached as Appendix C.

Statement of the Case

The Petitioner in this case is the Mescalero Apache Tribe, a tribe of Indians which entered into a treaty with the United States of America in 1852. The Mescalero Apache Tribe has a Reservation, part of aboriginal homelands, the remainder of which were ceded to the United States by the Treaty of 1852. Pursuant to 25 U.S.C. Section 476, the Mescalero Apache Tribe in 1936, adopted a constitution (T. 13), and has continued to be a viable, functioning Indian Tribe performing governmental functions under this constitution, tribal ordinances and applicable federal statutes.

Over the last several years the Mescalero Apaches have attempted to develop the Reservation and lands near the Reservation for the economic betterment of all members of the Tribe. In furtherance of this desire for economic independence and for the general well being of the Tribe, the Tribe developed a ski resort located in Otero and Lincoln Counties, New Mexico. The name of this resort is Sierra Blanca Ski Enterprises and it is exclusively owned and operated by the Mescalero Apache Tribe. The ski resort is on lands belonging to the United States Forest Service which have been leased to the Tribe for a period of thirty years. The ski resort area is bordered on the South by the Tribe's Reservation and some of the cross-country ski trails

are located on the Reservation, but the majority of the ski resort is located on federally leased lands.

The lease with the United States Forest Service was entered by the Tribe pursuant to Article XI Section 1 of the Tribe's constitution (T. 13). Though these lands are located outside the physical boundaries of the Reservation, they are under federal control through the Department of the Interior, the same as any lands located within the actual boundaries of the Reservation. The basic purpose of the ski resort is to provide revenue for the Tribe in lieu of raising revenue through the taxation of Tribal members or in some other endeavor. The revenue from the ski resort is being used for educational, social and economic welfare of the Mescalero Apache Tribe. The ski area also provides a job training center for the Mescalero Apache people and approximately 20 to 30 tribal members are employed at the ski resort in a job training capacity (T. 6).

After a feasibility study by the federal government, the Tribe secured financing from the federal government under 25 U.S.C. Section 470.

In May of 1968, after the improvements had been made and the ski resort was in operation, the Bureau of Revenue of the State of New Mexico conducted an audit. All the materials against which the tax was assessed were purchased with money borrowed by the Tribe from the federal government pursuant to 25 U.S.C. Section 470, and the purchases of all such materials were subject to and were approved by the Bureau of Indian Affairs, all as outlined in 25 C.F.R. pt. 91. Not only were the materials purchased with money borrowed by the Tribe from the federal government, but also the plans and specifications for the construction of the ski lift at the ski resort were approved by the federal government. (T. 16).

As a result of such assessment, a written protest was timely filed by the Tribe as required by Section 74-13-38 of the Tax Administration Act for the State of New Mexico. The procedures as outlined in the jurisdiction statement above were then followed. The facts were stipulated by both parties at the time of the hearing before the Commissioner, and the same stipulated facts have governed

this case at each step of the appellate process (T. 5-9).

This economic development was a further step by this progressive Tribe to make itself self-reliant; fulfilling the original basic reasons for federal power over Indians in that it protects Indian resources and leads to economic development. This purpose was acknowledged by the state in this very enterprise (T. 6). The action of the Bureau of Revenue of the State of New Mexico not only challenges this self-reliance, but flaunts the very existence of the Petitioner as a body politic—a sovereign Indian tribe under the control of the federal government; by asserting the tax the state is saying it can assert control over the Petitioner. For years the Petitioner has struggled to develop, and has turned to the federal government for assistance and direction. The federal government has responded with legislation, regulations and Bureau of Indian Affairs control to see that this economic development was not impaired.

Tribal property was not subject to state taxation when the horse and plow were utilized for economic development. The means have changed, such as the old enterprise in this case, but the purpose is unchanged. This is a natural direction for the Petitioner to turn due to the Treaty, federal control of the Reservation and the constitutional structure of the Tribe. Under such control it was only normal that the Tribe turn to the federal government when seeking means of implementing plans for economic development; funds available under 25 U.S.C. Section 470 appeared as a natural avenue for this development. It is through the funds available under 470 that the resort area was constructed and another leg to economic stability was added to the life of the Petitioner.

In years gone by, roaming the land and using the resources of nature have been the way of life for the Mesquero Apache people; now they are attempting to utilize these land resources for Tribal development in a way acceptable to the white man's civilization. As the Mesquero has turned from roaming the land to developing the land, he has always turned to the federal government for guidance and assistance. It would be unfair to this Peti-

tioner to see this trust relationship established over one hundred years ago and nurtured by the protection of the federal government, destroyed by the tax efforts of the State of New Mexico.

Reasons for Granting the Writ

1. The Petitioner, like other Indian Tribes, is starting to emerge through economic development. Economic development means continuity of tribal integrity and customs and assures tribal sovereignty. As this development has proceeded, states have cast a longing eye to this growth as a new source of tax revenue. This has led to the present confrontation between a sovereign Tribe and the State of New Mexico; that which the federal government has protected and nurtured through the Commerce Clause, a Treaty and federal statutes, is now being threatened by state tax activity. This is a crucial confrontation, as the Tribe must be able to develop economically if it is to survive.

Both these taxes represent a direct impairment of Petitioner's economic development. (a) It is a direct tax levied on the Tribe's conduct of the business and is actually assessed against the Tribe itself. (b) The amount of tax on a recurring basis over the life of the lease will have a direct impact on the Tribe. As stated in the Stipulation of Facts (T. 7 and 8), the gross receipts tax averages approximately \$12,500.00 a year and the compensation tax averages approximately \$2,500.00 a year. Extended over the thirty year life of the lease, these taxes would create a tax burden of approximately \$450,000.00. (c) Such a tax if allowed would open the door to other state taxes and lead to the eventual destruction of the tribal entity.

2. The Decision below conflicts with the Commerce Clause of the Constitution and the Petitioner's Treaty, both of which vest the federal government with exclusive jurisdiction over the Petitioner. The Treaty establishes a pattern of rules under which the Tribe will exist and establishes the initial trust relationship between the appellant and the federal government.

Whether the enterprise is located on tribal land or not is not the criteria to determine if the state may tax the

Tribes. The relevant factors are whether the enterprise is under federal control and regulation and is meeting an obligation under federal Indian policy. The statutes and regulations indicated throughout this brief show that the conduct, control and implementation of this enterprise are all under the direction of the Department of the Interior. The purpose is economic development and cultural stability. The purpose and control place this enterprise under the guidance of the federal government, to the exemption of the state, despite its location off the tribal lands proper.

The policy of protecting the status of Indian tribes is the same on these lands as it is on lands physically within the tribal boundaries, as it is preserving the trust relationship and allowing Indian competency and self-development to continue. *Squire v. Capoeman*, 351 U.S. 1, 76 S. Ct. 611, 100 L.Ed. 83 (1956). Even the actual use is consistent with federal Indian policy as it gives the Tribe a source of revenue that benefits the members of the Tribe and establishes a training ground in which Tribal members can develop commercial skills.

The United States has controlled Indian relations through the powers established in the Commerce Clause, U.S. Const. Art. I, Sec. 8, Cl. 3, which provides that Congress shall regulate commerce with the Indian Tribes. It is this regulatory power that was used for over 100 years to pre-empt state controls of liquor sales to Indians, on and off the Reservation. *United States v. Holliday*, 70 U.S. (3 Wall) 497, 18 L.Ed. 182 (1866); *United States v. 43 Gallons of Whiskey*, 93 U.S. 188, 23 L.Ed. 846 (1876).

Just as Congress previously extended federal control over liquor outside the boundaries of the Reservation to protect its beneficiaries whenever the interest of trade and commerce required it, Congress has now extended its economic control of Indian activities outside the Reservation to benefit its Indian beneficiaries. Cohen, *Federal Indian Law*, P. 91: "The power of Congress to regulate commerce with Indian Tribes has for its field of action the entire nation, not just the Indian country." This policy is performed under the Commerce Clause and implemented by specific statutes and regulations relating to Indians. 25 U.S.C. 465,

25 U.S.C. 470 and 25 C.F.R. pt. 91 indicate this federal control; it is under the protection of these statutes that the Tribe secured the funds to make the economic development that is now being threatened by the State.*

The lease upon which this enterprise is located was acquired pursuant to Article XI Sec. 1 of the Petitioner's Constitution (T. 6). Just as any other land or interest in land when utilized for the Tribal benefit, this leased land is performing a function of the trust interest since its use is approved by the Secretary of the Interior and it is utilized for the economic well being and social and economic improvement of the Tribe. The Petitioner suggests these leased lands have the same status as trust lands since utilized pursuant to the Tribal Constitution, under economic development statutes of the federal government and within Tribal jurisdiction as outlined in the Tribal Constitution, Article II (T. 13). 25 U.S.C. 465 refers to this interest as one held in trust by the United States for the Indian tribe. This theory further implements federal Indian policy by securing economic growth and preserving Indian culture.

Congress has drawn no distinction between interest on the Reservation and those off when implementing its policy of economic development. 25 U.S.C. 465 does not differentiate between on and off land or interest in land, but includes all Indian interests which promote the intent of 25 U.S.C. 470. The tax exemptions of 25 U.S.C. 465 apply whether the interest is on Tribal lands or lands on which the Tribe has an interest. In either case, the lands are protected under federal Indian policies for economic development and economic self sufficiency.

The State of New Mexico cannot grant or withhold from an Indian tribe the privilege of doing business, because the field of commerce with Indian tribes is completely removed from the sphere of state power by the Commerce Clause of

* It should be noted, that the Tribe's economic progress has gone outside the physical boundaries of the Tribe for many years; the Tribe presently has commercial bank accounts in various banks throughout the United States.

the Constitution, which gives the federal government exclusive power over commerce with the Indians no matter where the location of that commerce. The exclusive power of the federal government over commerce with Indians is not limited to Indian Reservations, but extends to any transaction with Indians. A tax laid directly upon the conduct of business by an Indian tribe is clearly contrary to federal authority, of federal Indian policy and a direct impairment of commerce with Indian tribes. The Treaty, with its concern for protecting the Indians, and the Commerce Clause control the commercial intercourse of the Tribes, with this directive implemented by federal legislation and regulations, all to the exclusion of the state.

3. The decision below misapplies the Enabling Act, June 21, 1910, 36 Statutes at Large 557, Ch. 310 Sec. 2, Cl. 2, as it strips away all tax shelters from the Tribe and makes them servient to the state government; the decision further places sovereign Indian tribes in the same category as individual Indians. The New Mexico Enabling Act is similar to Enabling Act provisions in several other western states. (See Idaho Constitution (1890, Art. 21, Sec. 19), Wyoming Constitution (1890, Art. 21, Sec. 25), Utah Constitution (28 Stat. 107, 108).) *United States v. Rickert*, 188 U.S. 432, 28 S. Ct. 475, 47 L.Ed. 532 (1903), interpreted the South Dakota Enabling Act when the State of South Dakota attempted to tax personal property interests of Indians; this act is similar to the New Mexico Enabling Act. The decision of the New Mexico Court of Appeals does not take into consideration *Rickert* and cases referring to the New Mexico Enabling Act.

In *United States v. Sandoval*, 231 U.S. 28, 34 S. Ct. 1, 58 L.Ed. 107 (1913), and *United States v. Chavez*, 290 U.S. 357, 34 S. Ct. 217, 78 L.Ed. 362, 365 (1933), the New Mexico Enabling Act was interpreted by this Court. Those cases declared that the New Mexico Enabling Act reiterates federal control over the Indian Tribes. The Enabling Act serves as a further limitation on the State of New Mexico in its relationship with sovereign Indian Tribes, a fact which has been misapplied by the New Mexico Court of Appeals.

As indicated above, the construction placed upon this provision by the Court of Appeals, indicates that the Enabling Act is a direct federal grant of power to New Mexico to tax Indian tribes when they have property or income off the Reservation; this language is certainly contrary to the language of the provision which distinguishes between individual Indians and tribes, and is clearly contrary to congressional intent expressed in that clause. Interpreted in the light of General Allotment Act policies existing at the time of the passage of the Enabling Act, it is clear that the provision relates solely to individual Indians, and is not a waiver by the United States of Indian tribal immunity from taxation.

4. The Decision of the New Mexico Court of Appeals interferes with Petitioner's right to self-government. The taxes in this case are assessed directly against the Indian Tribe. The taxes allowed by the Court of Appeals below are contrary to federal policies in that they have the effect of restricting Indian tribal choices of business ventures, with a further limitation as to the location of these ventures. Such a restriction thwarts self-government decisions by the Tribe and limits revenue raising projects of the Tribe, all to the detriment of Tribal members. State law may not be applied where it interferes with the Tribe's right to self-government. *Organized Village v. Egan*, 369 U.S. 60, 67-68, 82 S. Ct. 562, 7 L.Ed. 2d 573 (1962). Under the Treaty and under the Tribe's own Constitution, it is an independent, viable community in which the laws of the state have no force and effect. *Williams v. Lee*, 358 U.S. 217, 319, 79 S. Ct. 269, 3 L.Ed. 2d 251 (1959). *Williams* not only states that State law may not be applied where it interferes with the Tribe's right to self-government, but also lays down a very narrow area in which tribal relationships were considered not to be jeopardized by state action. See U.S. 217, 220-221, L.Ed. 2d 251, 253-254. The present case does not fall within these narrow exceptions. In fact, no greater threat to self-government can be imagined than the allowance of one sovereign to tax another. The power to tax is the power to destroy, rationale of *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 427, 4 L.Ed. 579, (1819), has been applied to Indian Tribes in *United States v. Rickert*, 188 U.S. 432, 438,

25 B. Cl. 472, 47 L.Ed. 532, 536 (1903).

5. The decision below allows taxation of a federal instrumentality, contrary to *United States v. Rickert*, Supra. *Rickert* indicates that taxing of Indian lands is a tax on an instrumentality employed by the federal government for the benefit and control of the Indian Tribe. The holding in *Rickert* gains importance in light of the language of 25 U.S.C. 470 "... for the purpose of promoting the economic development of the Tribes ...". 25 U.S.C. 470 sets up a means, or agency, by which the government assists the Indian Tribes, and the States have been disallowed any tax prerogative over such an instrumentality promoting the economic development by 25 U.S.C. 465.

The services performed by the Petitioner as an instrumentality of the federal government are essential. These same needs would be present whether the federal government or the Tribe was bearing this responsibility. Over the years the federal government has used various instrumentalities to meet its obligation of economic protection of the Indians.

This relationship between Congress and the Petitioner for economic development goes back to the terms of the Treaty itself, which establishes responsibility on the part of the federal government to protect and promote the Tribe's development. Under this protection the Tribe becomes a conduit, or instrumentality, in meeting the federal government's obligation.

25 U.S.C. 470 establishes a revolving loan fund in which the loans are repaid to the fund itself. If these funds are taxed, this creates a reduction in repayment and therefore places a burden on the federal government in implementing the purposes of the fund. Such a direct cause and effect relationship due to state taxation on the effort of the federal government to meet the requirements of 25 U.S.C. 470, further indicates that the Petitioner is a federal instrumentality, as a tax on the Petitioner will tax the efforts of the federal government.

This recurring tax will also decrease the amount of money which the Mescalero Apache Tribe will be able to apply toward advancing the social welfare and education of its

members over a thirty year period in which \$450,000.00 would be going to the State of New Mexico. Ironically, this money would not be returning to the Tribe in the form of educational benefits as the federal government presently meets the cost of educating the Indian tribes, 25 C.F. R. pt. 33. Such a tax result would create a direct burden upon the federal government.

The Congress could have established this fund directly under the Department of the Interior, but they chose to place these funds directly in the hands of the Tribes, under the control of the Department of the Interior. Whether by Department control or Tribal control the funds of 25 U.S.C. 470 are performing a federal function and are utilized by a federal instrumentality, and the State of New Mexico cannot tax this instrumentality.

6. The tax imposed by the State of New Mexico interferes with existing federal regulations and statutes which have pre-empted the field. As indicated in 25 U.S.C. 465 and 25 U.S.C. 470, Congress has taken very positive steps to remove any vestiges of state control over Indian economic efforts. In the present case it is obvious from the statute creating the economic fund, through regulations implementing the use of these funds, and through controls as indicated in the Stipulation of Facts (T. 5-9), that the federal government is vitally interested in the economic well being of the Tribe and intends to regulate and protect its economic growth.

It has been the goal of various acts passed by Congress to aid the Indian in economic development; these have included the establishment of the Bureau of Indian Affairs, the establishment of Reservations and the allotment system. In each case the result has been federal pre-emption of the state. In the present case Congress has changed the device to one of federal funding of economic projects, but has not changed the exempt status of the endeavor.

In *Warren Trading Post Co. v. Arizona Tax Commission*, 380 U.S. 685, 85 S. Ct. 1242, 14 L.Ed. 2d 165 (1965), this Court pre-empted the State from controlling the business of Indian traders on Reservations. The amount of legislation concerning regulation of Indian traders is an insignificant portion of the volume of federal legislation pertaining

to Indians. A review of the Stipulation of Facts and the federal statutes and regulations presently involved, indicate far greater federal control here than that imposed on the Indian trader in *Warren Trading Post v. Arizone Tax Commission*, *Supra*.

Where this much control exists for economic development, the State cannot interfere with that development and is therefore pre-empted.

7. The decision of the Court below transfers the status of Petitioner from a sovereign, dependent Indian Tribe to that of a corporation, contrary to the holding in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 8 L.Ed. 483 (1832). The Tribe is a federally chartered Indian Tribe under 25 U.S.C. 476, yet the Court of Appeals has continued to label it as a corporation organized under 25 U.S.C. 477. By so labeling the Petitioner, the Court has diluted Tribal sovereignty and jeopardized the Tribe's continuity; such action leaves the Tribe vulnerable to state control, all contrary to the Treaty, the Commerce Clause, the Tribe's Constitution and *Worcester v. Georgia*, *Supra*. It is through the structure of the federally chartered Indian tribe that the federal government can better effectuate its programs of economic development and assistance, like those outlined in 25 U.S.C. 470.

The term "Chartered Corporation" as applied to a Tribe organized under Section 476, refers to a political subdivision of the federal government. This again implements the Treaty requirements in cases cited establishing the Indians as dependent sovereigns, dependent upon the federal government. The decision of the court below removes the cloak of Indian sovereignty, leaving the Tribe vulnerable to state regulations.

Conclusion

We respectfully submit that the petition for the writ of certiorari should be granted.

Respectfully submitted,
FETTINGER & BURROUGHS

By F. Randolph Burroughs
Counsel for Petitioner

December, 1971

Appendix A

**IN THE COURT OF APPEALS OF THE STATE
OF NEW MEXICO**

THE MISCALERO APACHE TRIBE,

Appellant

NO. 635

**FRANKLIN JONES, COMMISSIONER
OF THE BUREAU OF REVENUE OF
THE STATE OF NEW MEXICO, AND
THE BUREAU OF REVENUE OF THE
STATE OF NEW MEXICO,**

Appellees

DIRECT APPEAL

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Santa Fe, New Mexico

Attorneys for Appellees

OPINION

HENDLEY, Judge. TO SUBMIT TO THE COURT THE MATTER OF THE

The Bureau of Revenue (Bureau) imposed a compensating tax on the Mescalero Apache Tribe, d/b/a Sierra Blanca Ski Enterprises (Tribe) based upon the purchase price of materials used to construct two ski lifts. The Bureau also imposed an emergency school tax on the gross receipts of the operation of the ski resort. The Tribe protested the compensating tax assessment and also filed a claim of refund for the sums paid under the emergency school tax assessment. The Bureau ruled adversely on the Tribe's protest of the compensating tax assessment and the claim of refund of the school taxes. The Tribe appeals directly to this court pursuant to Section 73-13-30, N.M.S.A. 1963 (Supp. 1969).

We affirm.

This appeal is based upon a stipulation of facts entered into by the Tribe and the Bureau, a summary of which is as follows. The Tribe is a treaty tribe, residing on reservation lands situated within the counties of Lincoln and Otero in the State of New Mexico and has adopted a constitution in accordance with governmental regulations. The ski resort is also located in Lincoln and Otero Counties and is on lands belonging to the United States Forest Service under a thirty year lease to the Tribe, except for some of the cross-country ski trails which are on reservation lands. No part of the ski resort buildings or equipment are located within the boundaries of the Tribe's reservation. The basic purpose of the ski resort is to provide revenue which is used for educational, social and economic welfare of the Tribe. The ski resort also provides a job training center for approximately twenty to thirty tribal members. The purchase and construction of the ski resort was totally financed by a loan from the Federal Government pursuant to 25 U.S.C.A. Section 470. The approval of the Bureau of Indian Affairs of the Department of Interior is required for the ski resort budget for each fiscal year, leasing of equipment or other property, leasing facilities to concessionaires, plans and designs for construction of additional facilities or im-

improvements, disposal of property other than expendable items, form and contents of monthly interim reports and accounting records and other related areas dealing with the ski resort.

On appeal the Tribe asserts: (1) the State has no authority to tax the Tribe; (2) assuming it has authority to tax the Tribe, the State, in its statutes, has not attempted to tax the Tribe; and (3) the Tribe is exempt from taxation because it is a federal instrumentality.

I. AUTHORITY TO TAX.

The Tribe contends that the State has no authority to tax because: (a) exclusive jurisdiction over the Tribe is vested in the Federal Government; (b) it is inconsistent with the Treaty between the Tribe and the Federal Government; and (c) it interferes with the Tribe's right to self-government.

(a) Exclusive Jurisdiction.

It is the Tribe's contention that the Treaty between the Tribe and the United States Government, which became effective March 25, 1883, vests exclusive jurisdiction over the Tribe in the Federal Government. Article I of the Treaty states:

"Article 1. Said nation or tribe of Indians through their authorized Chiefs aforesaid do hereby acknowledge and declare that they are lawfully and exclusively under the laws, jurisdiction, and government of the United States of America, and to its power and authority they do hereby submit."

The Tribe further contends that this argument is buttressed by Article I, Section 8 of the United States Constitution which states that the United States Congress shall have power "To regulate commerce with foreign nations, and among the several states, and with the Indian Tribes;

"We agree with the Tribe on this general proposition, but we must call attention to the fact that the Tribe submitted to the United States "power and authority." Subsequently, the United States Congress, on June 20, 1910, 36 Statutes

at large 557, ch. 510, enacted the Enabling Act for New Mexico. Section 2, second, after stating that Indian land shall be under the absolute jurisdiction and control of the Congress of the United States, stated in part:

(B)ut nothing herein, or in the ordinance herein provided for, shall preclude the said state from taxing, as other lands and other property are taxed, any lands and other property outside of an Indian reservation owned or held by an Indian, save and except such lands as have been granted or acquired as aforesaid or as may be granted or confirmed to any Indian or Indians under any act of congress, but said ordinance shall provide that all such lands shall be exempt from taxation by said state so long and to such extent as congress has prescribed or may hereafter prescribe."

This Enabling Act is a specific grant of power which was later incorporated into Article XXI, Section 2, of the New Mexico Constitution wherein the almost identical language was adopted.

Consequently, by virtue of the Enabling Act the Federal Government permitted the State of New Mexico to tax, "... as other lands and other property are taxed, any lands and property outside of an Indian reservation ... owned or held by any Indian."

The Tribe contends that under Article VI, (Clause 2), of the United States Constitution, when there is a conflict between a Treaty and the provision of a State Constitution or statute, regardless of whether the State constitutional or statutory provision is prior to or subsequent to the making of the Treaty, the Treaty will control. *United States v. Belmont*, 301 U.S. 324, 57 S. Ct. 758, 81 L.Ed. 1134 (1937). We agree with this general proposition, however, we do not find the Treaty to be in conflict with the provisions of the New Mexico Constitution or any of its statutes when the tax is on lands or properties located off Indian land. The Treaty submits the Tribe to the laws of the United States, and the Enabling Act permits New Mexico to tax in this situation.

The Tribe contends the lease of the Federal Forest Service lands was an acquisition of land under 25 U.S.C.A. Section 465, which permits the Secretary of Interior to acquire lands within or without existing reservations for the purpose of providing lands for Indians. 25 U.S.C.A. Section 465 provides that title to "any lands or rights acquired" pursuant to 25 U.S.C.A. Section 470 shall be exempt from State taxation. The purchase and construction of the ski resort was financed by a loan under 25 U.S.C.A. Section 470. Assuming the Tribe's leasehold rights and its interest in the ski resort facilities are land, or rights acquired in land, a proposition we do not decide, the exemption from State taxation is also to land, or rights acquired in land. The tax involved here applies neither to land nor to rights acquired in land. The tax under the old "compensating or use tax" is on tangible personal property, see Section 72-17-3, N.M.S.A. 1953 (Repl. Vol. 10, pt. 2) and under the Emergency School Tax Act on the privilege of engaging in business activities within New Mexico. See Section 72-16-4.1, N.M.S.A. 1953 (Repl. Vol. 10, pt. 2); see *Edmunds v. Bureau of Revenue*, 64 N.M. 454, 330 P. 2d 131 (1955). The exemption under 25 U.S.C.A. Section 465 does not apply in this case.

We have considered the Tribe's other contentions and cited cases, but find them distinguishable on the facts and under the law above cited.

(b) *The Taxation Being Inconsistent with the Treaty.*

The Tribe relies upon Articles 9, 10 and 11 of the Treaty when read with Article 1, cited above, for the proposition that the Treaty imposed a duty on the United States Government to pass legislation and do other acts to insure the permanent prosperity and happiness of the Tribe and that the United States Government is duly bound by this Treaty to make donations, gifts and implements to the Tribe. The Tribe contends that it would be inconsistent with those purposes for the State of New Mexico to be allowed to disrupt the scheme of the Federal Government by permitting an imposition of New Mexico taxes on the Tribe.

We fail to see the merit of the argument. In reviewing the other Articles of the Treaty, the apparent purpose of

the Treaty was to insure the Tribe of certain lands and of certain freedoms on tribal lands but it did not include freedom from a situation as disclosed by the facts of this case.

A We do not pass judgment on the contention of the Tribe that the Federal Government is interested in the financial success of the Tribe's operation of a ski resort; however, we fail to see, in light of the foregoing Treaty and Enabling Act provisions, how the Federal Government intended to exempt the Tribe from taxation for activities and operations occurring off Indian lands. The Enabling Act itself denies this contention.

(c) *Interference with Tribe's Right to Self-Government.*

We agree with the Tribe's contention that if the imposition of a State tax on the Tribe interferes with the Tribe's right to reservation self-government the tax must fall. *Ghahate v. Bureau of Revenue*, 80 N.M. 98, 451 P. 2d 1002 (Ct. App. 1969). The Tribe claims such interference in this case even though the taxes involved arose from and because of operations conducted by the Tribe on non-Indian land. The claim is based on the fact that revenue derived from the ski resort operation is used for the welfare of the Tribe and the resort provides job training for members of the Tribe. These facts show no interference with reservation self-government. The Tribe contends, however, that it might interfere because the power to tax is the power to destroy and: "The purpose for which the appellant entered into the ski resort operation is being frustrated and possibly could even be totally defeated if New Mexico is allowed to tax the operation." There are no facts showing a present frustrated purpose; the remainder of the argument is no more than speculation. There being no factual basis for the claim, it is rejected. Compare *Village of Kake v. Egan*, 369 U.S. 60, 80 S. Ct. 562, 7 L.Ed. 2d 573 (1962); *McClanahan v. State Tax Commission*, _____ Ariz. App. _____, 484 P. 2d 221 (1971).

2. AUTHORITY TO TAX THE TRIBE WHICH THE STATE HAS NOT ATTEMPTED TO TAX.

It is the Tribe's contention here that since it is not specifically named in Section 72-17-2 (e), N.M.S.A. 1953

(Repl. Vol. 1961) of the Compensating Tax Act, and Section 72-16-3 (A), N.M.S.A. 1953 (Repl. Vol. 1961) of the Emergency School Tax Act (both repealed July 1, 1967, and both taxes were for periods of time prior to the repeal), that they are excluded on the basis that general acts do not apply to State statutory authority to tax the Tribe. See *Chouteau v. Commissioner of Internal Revenue*, 38 F. 2d (1930); compare *Southern Union Gas Company v. New Mexico Public Service Commission* _____ N.M._____, 482 P. 2d 913 (1971).

No claim is made that the Tribe does not come within the definition of "person" in Sections 72-17-2 (e) and 72-16-2 (A), *supra*. The claim is simply that to be taxable, the Tribe must have been specifically named. We disagree. Whatever may be the current validity of the concept that Indians could not be taxed unless specifically named, the Enabling Act specifically permitted the taxation "as other lands and other property are taxed, any lands and other property outside of an Indian reservation owned or held by any Indian. . . ." With this specific federal legislative permission, we see no basis in reason, in New Mexico, for the concept that Indians must be specifically named to be included within a statute of general application. The Enabling Act states that Indian property, in the situation in this case, is to be taxed as other property is taxed.

3. TRIBE EXEMPT FROM TAXATION BECAUSE IT IS A FEDERAL INSTRUMENTALITY.

It is the Tribe's contention here that even assuming New Mexico does have authority to tax the Tribe, and assuming further that the Tribe comes within the definition of "person" in the taxing statutes, the Tribe is exempt because it is a federal instrumentality.

The Tribe cites the *Handbook on Federal Indian Law*, U. S. Printing Office (1958) at page 853, for the proposition that insofar as the instrumentality doctrine is concerned, it relates to Indians, their property and their affairs. We do not agree with the Tribe on this general proposition. The Tribe's argument is based on the fact that it is a Tribe and its ski resort operation is financed and supervised by

the Federal Government. These facts, in our opinion, are insufficient to support a conclusion that the ski resort is virtually an arm of the United States Government, see dissenting opinion of Justice Marshall in *Agricultural Nat. Bank v. Tax Commission*, 392 U.S. 339, 80 S. Ct. 2173, 20 L. Ed. 2d 1138 (1963), and cases cited therein; certainly the ski resort is not essential for the performance of governmental functions, but, even if the ski resort could be considered a federal instrumentality, the immunity of the resort from taxation is removed by the provisions of our Enabling Act previously discussed in this opinion.

Affirmed.

IT IS SO ORDERED.

s/ William R. Hendley
JUDGE

I CONCUR:

s/ Joe W. Wood, C. J.

Lewis R. Sutin, J. (specially concurring)

SUTIN, Judge (Specially concurring)

I specially concur only because the Mesonero Apache Tribe or Sierra Blanca Ski Enterprises, I.D. No. 14-703019-00, which owns the ski resort, is a federal Indian chartered "corporation," pursuant to 25 U.S.C.A., Sections 477 and 470.

The fact of being a chartered corporation does not appear in the stipulation. Nevertheless, it states:

7. The purchase and construction of the ski resort was financed completely by a loan to the Tribe by the federal government under 25 U.S.C.A., Section 470.

25 U.S.C.A., Section 470 provides that the Secretary of the Interior "... may make loans to Indian chartered corporations for the purpose of promoting the economic development of such tribes and of their members, . . ."

25 U.S.C.A., Section 477 provides that the Secretary of the Interior may issue a charter of incorporation to a tribe. It further provides:

Each charter may convey to the *Incorporated tribe* the power to purchase . . . , or otherwise own, hold, manage, operate, and dispose of property of every description, real and personal, . . . and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law, Any charter so issued shall not be revoked or surrendered except by Act of Congress. (Emphasis added.)

Article XI, Section 1 (a) of the Tribe's Revised Constitution is a part of the stipulation. It provides that the Mescalero Apache Tribal Council has the duty and power to transfer tribal property and other assets to tribal corporations.

The Mescalero Apache Tribe states in its reply brief:

The issue of a federally chartered corporation under Section 477 is not present in this case.

To me, this constitutes an admission that the Tribe, or Sierra Blanca Ski Enterprises is an Indian chartered corporation. This corporation should be taxed.

The Notice of Assessment of Taxes by the Commissioner was made to Sierra Blanca Ski Enterprise, not to the Tribe. The title of the Protest of Assessment filed by the Tribe refers to Sierra Blanca Ski Enterprises. The Tribe stated it was the "owner and operator of Sierra Blanca Ski Enterprises." In the title to the stipulation of the facts and the decision and order of the Commissioner, it is described as "Mescalero Apache Tribe, d/b/a Sierra Blanca Ski Enterprises, I.D. No. 14-703019-00." The Tribe was taxed in this name because probably it led the Commissioner to believe it was not a chartered corporation.

If the assumptions of corporate life in this specially concurring opinion are wrong, and called to the attention of this court on motion for rehearing, I will dissent. I do not agree that an Indian Tribe is subject to payment of the state compensating tax or school tax assessments.

This appears to be the first state tax case against an Indian chartered corporation or tribe. Let us take a look at the history of corporate Indian tribes.

Cohen's Handbook of Federal Indian Law, p. 377, states:

In the narrow sense in which the term is frequently used, a corporation is something chart-

ered by a government, and in this sense only those Indian tribes which have been chartered by some government, e.g., the Pueblos of New Mexico incorporated by territorial legislation, and the tribes incorporated under section 17 of the Act of June 18, 1934, (25 U.S.C.A., Section 477) are to be considered corporations.

See *United States v. Lucero*, 1 N.M. 422, 438 (1909).

In *Cohen's*, *supra*, p. 278, 279, the author says:

Thus it has been administratively determined that the Pueblos of New Mexico are entitled to receive grazing privileges under the Taylor Grazing Act, under the clause in section 3 of that act conferring such rights upon "corporations authorized to conduct business under the laws of the State." The principle involved would appear to be equally applicable to any Indian tribe which has a recognized corporate status, either under the Act of June 18, 1934, or otherwise.

See also *Cohen's*, *supra*, p. 309, wherein it is said:

The corporate status of the Pueblos has been recognized in many cases.

The corporate status of Pueblo Indian communities, created in 1847, is still alive in New Mexico. Section 51-17-1, N.M.S.A. 1903 (Rept. Vol. 2, pt. 1). This section gave the Indian Pueblos the status of bodies politic and corporate, and, as such, empowered them to sue in respect of their lands. *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110, 63 L.Ed. 504, 39 S. Ct. 185 (1918); *Garcia v. United States*, 43 F. 2d 872 (10th Cir. 1930).

In 1904, the Supreme Court of New Mexico held taxable the lands of the Pueblo Indians in New Mexico. *Territory v. Delinquent Taxpayers*, 12 N.M. 139, 76 P. 307 (1904).

The Tribe claims 25 U.S.C.A., Section 465 is a restraint on state's activities. This section applies to title to lands taken in the name of the United States in trust for the Indian tribe or individual Indian. Such lands are exempt from state and local taxation. Chartered Indian corporations are not covered by this section. But see, *Martinez v. Southern Ute Tribe*, 150 Colo. 304, 374 P. 2d 691 (1962).

Under the state taxing acts, a "person" includes a corporation. They do not exclude Indian chartered corporations. Neither is the Indian chartered corporation exempt from payment of taxes. If it were intended to be an instrumentality of the United States, it would have been so stated in 25 U.S.C.A., Section 477.

It might be noted that Section 72-13-79, N.M.S.A. 1953 (Repl. Vol. 10, pt. 2, Supp. 1969), of the Tax Administration Act, adopted in 1965, provides:

Liens will attach or levy may be made by terms of any provision of the Tax Administration Act . . . to or on property belonging to the United States of America or to an Indian tribe, an Indian pueblo or any Indian only to the extent allowed by law.

Here again, the Indian chartered corporation is omitted.

Some states "have been given jurisdiction by federal statute over the reservations within their borders. The tribes within these states no longer exercise governmental functions independent of the state. Moreover, Congress has authorized all states to extend jurisdiction over tribes within their borders by official act" with tribal consent. 25 U.S.C.A., Sections 1321-22 (Supp. 1970); 82 Harvard Law Review 1343. New Mexico has not moved toward assumption of jurisdiction.

The Mescalero Apache Tribe has left the confines of its reservation. It has donned the robes of a corporation to join its competitors in business. It stood high in its tradition as a separate "nation." It now stands strong in its business and cultural development. As it earns from citizens of this country, it should carry the same burdens of taxation as its competitors. It may even continue in additional ventures in business in every phase of corporate life. New Mexico should welcome this adventure as much as it has welcomed others to come in the last 123 years.

In my opinion, an Indian chartered corporation operating on non-Indian land is subject to the compensating tax and school tax of this state.

For these reasons, I specially concur.

s/ Lewis R. Sutin
Judge

Appendix B

FRANKLIN PIERCE,

PRESIDENT OF THE UNITED STATES
OF AMERICA:

July 1, 1852.

TO ALL AND SINGULAR TO WHOM THESE
PRESENTS SHALL COME GREETING:

Preamble.

WHEREAS a Treaty was made and concluded at Santa Fé, New Mexico, on the first day of July, in the year of our Lord one thousand eight hundred and fifty-two, by and between Col. E. V. Sumner, U. S. A., commanding the 9th Department, and in charge of the Executive Office of New Mexico, and John Greiner, Indian Agent in and for the Territory of New Mexico, and acting Superintendent of Indian Affairs of said Territory, representing the United States, and Oontas Azules, Blancito, Negrito, Capitán Simon, Capitán Vuelta, and Mangus Colorado, chiefs, acting on the part of the Apache nation of Indians, situate and living within the limits of the United States, which treaty is in the words following, to wit:

Articles of a Treaty made and entered into at Santa Fé, New Mexico, on the first day of July in the year of our Lord one thousand eight hundred and fifty-two, by and between Col. E. V. Sumner, U. S. A., commanding the 9th Department and in charge of the Executive Office of New Mexico, and John Greiner, Indian Agent in and for the Territory of New Mexico, and acting Superintendent of Indian Affairs of said Territory, representing the United States, and Oontas Azules, Blancito, Negrito, Capitán Simon, Capitán Vuelta, and Mangus Colorado, chiefs, acting on the part of the Apache Nation of Indians, situate and living within the limits of the United States.

Article 1. Said nation or tribe of Indians through their authorized Chiefs aforesaid do hereby acknowledge and declare that they are lawfully and exclusively under the laws, jurisdiction, and government of the United States of America, and to its power and authority they hereby submit.

Authority of
United States
acknowledged.

Peace to exist.

ARTICLE 2. From and after the signing of this Treaty hostilities between the contracting parties shall forever cease, and perpetual peace and amity shall forever exist between said Indians and the government and people of the United States; the said nation, or tribe of Indians, hereby binding themselves most solemnly never to associate with or give countenance or aid to any tribe or band of Indians, or other persons or powers, who may be at any time at war or enmity with the government or people of said United States.

The Apaches
not to assist other
tribes in hostilities.

Good treatment
of citizens of the
United States by
nation of peace
with them.

ARTICLE 3. Said nation, or tribe of Indians, do hereby bind themselves for all future time to treat honestly and humanely all citizens of the United States, with whom they may have intercourse, as well as all persons and powers at peace with the said United States, who may be lawfully among them, or with whom they may have any lawful intercourse.

Cases of aggression
on them to be re-
ferred to government.
Laws to be
conformed to.

ARTICLE 4. All said nation or tribe of Indians, hereby bind themselves to refer all cases of aggression against themselves or their property and territory, to the government of the United States for adjustment, and to conform in all things to the laws, rules, and regulations of said government in regard to the Indian tribes.

Provisions against
incursions into
Mexico.

ARTICLE 5. Said nation, or tribe of Indians, do hereby bind themselves for all future time to desist and refrain from making any "incursions within the Territory of Mexico" of a hostile or predatory character; and that they will for the future refrain from taking and conveying into captivity any of the people or citizens of Mexico, or the animals or property of the people or government of Mexico; and that they will, as soon as possible after the signing of this treaty, surrender to their agent all captives now in their possession.

Persons inter-
ing the Apaches
to be tried and
punished.

ARTICLE 6. Should any citizen of the United States, or other person or persons subject to the laws of the United States, murder, rob, or otherwise mistreat any Apache Indian or Indians, he or they shall be arrested and tried, and upon conviction, shall be subject to all the penalties provided by law for the protection of the persons and property of the people of the said States.

Article 7. The people of the United States of America shall have free and safe passage through the territory of the aforesaid Indians, under such rules and regulations as may be adopted by authority of the said States.

Free passage
over the Apache
territory.

Article 8. In order to preserve tranquility and to afford protection to all the people and interests of the contracting parties, the government of the United States of America will establish such military posts and agencies, and authorize such trading houses at such times and places as the said government may designate.

Military posts,
agencies, and trading
houses to be establish-
ed.

Article 9. Relying confidently upon the justice and the liberality of the aforesaid government, and anxious to remove every possible cause that might disturb their peace and quiet, it is agreed by the aforesaid Apache's that the government of the United States shall at its earliest convenience designate, settle, and adjust their territorial boundaries, and pass and execute in their territory such laws as may be deemed conducive to the prosperity and happiness of said Indians.

Territorial
boundaries to be
adjusted.

Article 10. For and in consideration of the faithful performance of all the stipulations herein contained, by the said Apache's Indians, the government of the United States will grant to said Indians such donations, presents, and implements, and adopt such other liberal and humane measures as said government may deem meet and proper.

Presents to the
Apaches.

Article 11. This Treaty shall be binding upon the contracting parties from and after the signing of the same, subject only to such modifications and amendments as may be adopted by the government of the United States; and, finally, this treaty is to receive a liberal construction at all times and in all places, to the end that the said Apache Indians shall not be held responsible for the conduct of others, and that the government of the United States shall legislate and act as to secure the permanent prosperity and happiness of said Indians.

When treaty
to be binding.

Now construed.

In faith whereof we the undersigned have signed this Treaty, and affixed thereto our seals, at the City of Santa Fe, this the first day of July in the year of our Lord one thousand eight hundred and fifty-two.

WITNESSES:

F. A. CUNNINGHAM,
Paymaster, U.S.A.

J. C. McFERRAN,
1st Lt. 3d Inf. Act. Ast. Adj. Gen.

CALEB SHIMMAN,

FRED SATFORD,

CHAS. McDONNELL,

Surgeon, U.S.A.

E. M. SAIED,

Witness to the signing of Mangus Colorado.

JOHN ROSE,

Nvt. Capt. T. E.

E. V. SUMNER,

(Seal)

Bvt. Col. U. S. A. com'g 9th Dep't. In

charge of Executive Office of New

Mexico.

JOHN GRINER,

Act. Supt. Indian Affairs, New Mexico.

CAPTAIN SUMNER, his x mark (Seal)

CUNTHAS SUMNER, his x mark (Seal)

MANCINO _____, his x mark (Seal)

HERNANDO _____, his x mark (Seal)

CAPTAIN SUMNER, his x mark (Seal)

MANGUS COLORADO, his x mark (Seal)

AND WHEREAS the said Treaty having been submitted to the Senate of the United States, for its constitutional action therein, the Senate did, on the twenty-third day of March, one thousand eight hundred and fifty-three, advise and consent to the ratification of its articles, by a resolution in the words and figures following, to wit:

IN EXECUTIVE SESSION, SENATE OF THE UNITED STATES,
March 23d, 1853.

Resolved, (two thirds of the Senators present concurring,) That the Senate advise and consent to the ratification of the Articles of a Treaty made and entered into at Santa Fe, New Mexico, on the first day of July, in the year of our Lord, 1852, by and between Colonel E. V. Sumner, United States Army, commanding the 9th Department, and in charge of the Executive Office of New Mexico, and John Griner, Indian Agent in and for the Territory of New Mexico, and acting Superintendent of Indian Affairs of said

Territory, representing the United States, and Cuentas Azules, Blancito, Negrito, Capitan Simon, Capitan Vuelta, and Mangus Colorado, chiefs, acting on the part of the Apache nation of Indians, situate and living within the limits of the United States.

Attest— **ASBURY DICKINS, Secretary.**

Now, therefore, be it known, that I, **FRANKLIN PIERCE**, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in their resolution of the twenty-third day of March, one thousand eight hundred and fifty-three, accept, ratify, and confirm the said treaty.

In testimony whereof, I have caused the seal of the United States to be herewith affixed, having signed the same with my hand.

Done at the city of Washington, this twenty-fifth day of March, in the year of our Lord one thousand eight hundred and (L.S.) fifty-three, and of the Independence of the United States the seventy-seventh.

FRANKLIN PIERCE.

BY THE PRESIDENT:

W. L. MARCY, Secretary of State.

Appendix C

1. 25 U.S.C. Section 476: "Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and by-laws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under the rules and regulations as he may prescribe. Such constitution and by-laws, when ratified as aforesaid and approved by the Secretary of the Interior, shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and by-laws may be ratified and approved by the Secretary in the same manner as the original constitution and by-laws.

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments. The Secretary of the Interior shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of the Budget and the Congress.

2. Partial Table of Contents, 25 C.F.R. pt. 91: (This regulation is too long to reproduce; for reference to particular sections, a portion of its Table of Contents follows:)

"Part 91 — General Credit to Indians

1. Purpose.

2. Eligible borrowers.

91. 3 Application.**91. 4 Purpose of loans.****91. 5 Approval of loans.****91. 6 Interest.****91. 7 Records and reports.****91. 8 Maturity.****91. 9 Security.****91. 10 Penalties on default.****91. 11 Assignment.****91. 12 Tribal funds.****91. 13 Relending by borrower.****91. 14 Repayments.****91. 15 Charters.****91. 16 Educational loans.****91. 17 Amendments to articles of association and by-laws.****91. 18 Loans to Navajo and Hopi Indians.****91. 19 Loans to encourage industry.****91. 21 Loans for expert assistance."**

A Partial Table of Contents 25 C.F.R. pt. 91. (This regulation is too long to reproduce, for reference to parts of the regulation, a portion of the Table of Contents follows.)

"Part 91—General Credit to Indians

91. 1 Purpose

91. 2 Eligible borrowers